ANNA R. WILLIAMS
FRANCES L. ROYLANCE

IBLA 91-135, 91-136 Decided April 8, 1993

Appeals from decisions by the Bureau of Land Management Area Manager, House Range Resource Area, Utah, rejecting final proofs and cancelling desert land entries U-51874 and U-51888.

Affirmed.

1. Desert Land Entry: Cancellation--Desert Land Entry: Final Proof--Desert Land Entry: Water Right--Desert Land Entry: Water Supply

It is proper for BLM to cancel a desert land entry when the entrant had clearly failed to demonstrate that, during the statutory life of the entry, she acquired or was taking the necessary steps to acquire the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of Mar. 3, 1877.

APPEARANCES: Anna R. Williams and Frances L. Roylance, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Anna R. Williams and Frances L. Roylance have appealed from two January 2, 1991, decisions by the Area Manager, House Range Resource Area, Utah, Bureau of Land Management (BLM), rejecting their final proofs and cancelling desert land entries U-51874 and U-51888.

On December 28, 1982, and May 5, 1983, Williams and Roylance filed desert land entry applications pursuant to section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1988). 1/ In their applications they stated that they intended to irrigate the land with water from Warm Creek, which runs through the applied-for land, by flood irrigation or 160-acre

1/ The 313.99 acres sought by Williams is described as: S½ SE¼ sec. 33 and SW¼ SW¼ sec. 34, T. 15 S., R. 19 W., and lots 4, 5, sec. 3, and lots 1-3, 6-8, sec. 4, T. 16 S., R. 19 W., Salt Lake Meridian, Millard County, Utah. The 200 acres sought by Roylance is described as: W½ SW¼, SE¼ SW¼ sec. 33, T. 15 S., R. 19 W., and NE¼ SE¼ sec. 3 and NE¼ SW¼ sec. 4, T. 16 S., R. 19 W., Salt Lake Meridian, Millard County, Utah.

circle pivot sprinklers. Alfalfa was to be the principal cash crop and they stated that there was adequate water to supply 10 gallons of water per minute per acre under production.

Williams and Roylance are the wife and daughter of Earl C. Williams, the apparent principal owner of the Warm Creek Ranch. This ranch is adjacent to the parcels described in the applications, and the entry parcels would be farmed as a part of the Warm Creek ranch operations.

All of the entered land was deemed irrigable, and BLM allowed the Williams and Roylance entries on April 20, and May 23, 1983, subject to the condition that acceptance of final proof was contingent upon their satisfying the reclamation and cultivation requirements of the Act of March 3, 1877, and its implementing regulations. They were also required to demonstrate that they "have a completely developed source and supply of irrigation water that is adequate to permanently irrigate all the irrigable acres in the entry and that you have a legal right to the use of this water" when submitting final proof. Williams and Roylance initially had until April 20, and May 23, 1987, the fourth anniversary dates of allowance of their entries, to submit final proof. See 43 CFR 2521.6(a); Thomas D. Hickey, 34 IBLA 86, 87 (1978).

On April 17, 1987, they filed notices of their intent to make final proof, and June 25, 1987, was set as the date for making final proof. See 43 CFR 2521.6(c). BLM examiners inspected both entries on June 23, 1987, and prepared a Staff Report, dated June 26, 1987. The examiners found that, for the most part, the land had been cleared of vegetation and generally well plowed. They also found that a portion of Williams' entry (15-20 acres in tracts 4 and 5) was being cultivated, and that a portion of Roylance's entry (40 acres in tract 4) had been cultivated. 2/ However, no other land could be irrigated because the lateral pipelines connecting the pivot sprinklers to the main pipeline had not been installed. 3/

During the June 25 meetings Earl C. Williams made an oral request for a 60-day extension of time for making final proof, stating that the additional time was needed to construct the lateral pipelines and put the balance of the land into cultivation. See Staff Report, dated June 26, 1987, at 3. On July 9, 1987, Williams and Roylance filed written requests for a 60-day extension of time to permit pipe installation.

2/ The field examination findings regarding the extent of reclamation and cultivation on the entries were confirmed by the applicants and two witnesses (Earl C. Williams and John Sims) on June 25, 1987, when final proof was submitted. See Staff Report, dated June 26, 1987, at 2.

3/ Tract 4 of Roylance's entry was capable of being irrigated using an existing 160-acre circle pivot sprinkler which served adjacent land. Existing ditches served tract 5 of Roylance's entry and adjacent land, and existing surface pipelines served tracts 4 and 5 of Williams' entry.

In his July 21, 1987, decisions, the Area Manager accepted the Williams final proofs for 80 acres in lots 6 and 7 of sec. 4 and the Roylance proof for 80 acres in the NE¼ SE¼ sec. 3 and the NE¼ SW¼ sec. 4. Those tracts were accepted because the land was either irrigated or capable of being irrigated, and was or had been under cultivation. 4/ The entries were cancelled for the remainder of the entry land because it was neither irrigated nor capable of being irrigated. Finally, responding to the extension requests, the Area Manager noted that no extension could be granted "after the final proof meeting has been held." Williams and Roylance appealed from the Area Manager's decisions.

On March 28, 1989, the Board issued its decision in Anna R. Williams, 108 IBLA 88 (1989), affirming the Area Manager's July 1987 decisions to the extent that they had accepted the applicants' final proof. Those portions of the Area Manager's decisions denying Williams' and Roylance's requests for extensions of time for making final proof were set aside because nothing in the statute or regulations requires that requests for extensions
be filed at any time before the end of the initial 4-year period for making final proof. BLM was directed to act upon the extension requests and Williams and Roylance were afforded 30 days from the date of receipt of
our decision to file supplemental statements in support of their requests.

Williams and Roylance filed supplemental statements on April 21, 1989, requesting 3-year extensions of time to permit installation of the water systems, and stating that the pipe and other necessary materials were on hand. In May 2, 1989, decisions, the Area Manager granted 18-month extensions, noting the Williams and Roylance April 21 statements that they had all of the necessary equipment. Williams and Roylance did not object. The extended deadlines for final proof were November 3, 1990 (Williams), and November 12, 1990 (Roylance).

No additional time was requested, and on November 7, 1990, Williams and Roylance again filed notices of their intent to make final proof, in accordance with 43 CFR 2521.6(b), stating that the water for their entries would be conveyed from Warm Creek to a sprinkler system by underground pipe. On November 15, 1990, the Area Manager issued decisions holding
the Williams and Roylance desert land entry applications for rejection, pending submission of proof that they had taken the necessary steps to secure sufficient water to irrigate the irrigable land described in the entries. See 43 CFR 2521.6(h). The Area Manager decision specifically noted that Williams and Roylance had not submitted evidence that they had acquired water rights from the State, and informed them that failure to submit proof within 30 days of receipt of the decisions would result in
the rejection of their applications. 5/

4/ The Area Manager accepted final proof for the land described as tracts 4 and 5 of each of the entries in the June 1987 Staff Report.
5/ The Area Manager mistakenly indicated that failure to make adequate final proof of water right ownership would result in the rejection of their applications. The entries had been allowed, and BLM's only recourse was to cancel the entries.

On December 13, 1990, BLM received copies of various documents that had been filed with the Utah Division of Water Rights (UDWR) on December 11, 1990. The first set of documents consists of two "Application to Segregate a Water Right" forms filed by Earl C. Williams, seeking permission to drill three wells in secs. 33 and 35, T. 15 S., R. 19 W., and sec. 3, T. 16 S., R. 19 W., Salt Lake Meridian, Utah, and divert 4.53 cubic feet per second from the wells to private lands under existing water rights held by him (Nos. 18-611 and 18-612). The second set was "Assignment of Water Application" forms transferring the segregation applications to Williams and Roylance. The third set was "Application for Permanent Change of Water" forms, filed by Williams and Roylance, seeking permission to divert this water to their desert land entry lands.

In his January 2, 1991, decisions, the Area Manager rejected their final proofs and cancelled both applications. The stated basis for his action was the fact that, despite having had 4 years from allowance of their entries and an 18-month extension, Williams and Roylance had failed to demonstrate that they hold a water supply. He first noted that, if approved, the water right applications they had submitted would allow Williams and Roylance "to drill three wells in an attempt to obtain water." He then stated that they had failed to "show specifically the source and volume of the water supply and how it was acquired and how it is maintained," as required by 43 CFR 2521.6(e). Williams and Roylance appealed from this decision.

BLM properly adjudicated appellants' proof submitted in response to BLM's November 1990 decisions. See Harry Gray Browne, 121 IBLA 218, 219-21 (1991). This finding is consistent with the Department's practice of adjudicating desert land entries in the absence of the making of final proof when the record clearly establishes that the person making the entry has failed to comply with the law during the statutory life of the entry. See, e.g., Mathilda L. Battilana, A-30558 (Aug. 2, 1966), at 6; Wayne E. Bright, A-30475 (Feb. 4, 1966), at 5 (filing of final proof would be "meaningless gesture").

[1] The Act of March 3, 1877, authorizes the Secretary of the Interior to issue patent for desert land upon payment of $1 per acre if, within 4 years of the date of entry, the person making entry submits satisfactory proof that at least $3 per acre have been expended in reclamation, the land has been reclaimed, and one-eighth of the reclaimed acreage has been reduced to cultivation. See 43 U.S.C. §§ 321, 328, 329 (1988); 43 CFR 2521.6(a). The purpose of this Act is the permanent reclamation of desert land, and the applicant must demonstrate construction of irrigation works allowing the entrant to successfully irrigate and reclaim the irrigable portions of the claimed land (see 43 CFR 2521.6(e), (f), and (h)(3); Nathan F. Gardiner, 114 IBLA 380, 383-84, 391 (1990)). The applicant must also show that at least one-eighth of the land has been irrigated and reduced to cultivation (see 43 CFR 2521.6(f), (g), and (h)(3); Nathan F. Gardiner, supra at 384-85). It therefore stands to reason that the entrant must have a supply of water adequate to successfully irrigate and reclaim the entire irrigable portions of entry land. See United States v. Swallow, 74 I.D. 1, 6-7

(1967); Orin P. McDonald, 13 L.D. 30, 31 (1891). 6/ An integral part of the necessary proof is evidence that the applicant has acquired or has taken all steps necessary to acquire sufficient water to accomplish this purpose. See 43 CFR 2521.6(h); Harry Gray Browne, supra at 222; Frank Strouf, 43 L.D. 449, 451 (1914). Sufficient water must be legally and physically available. See 43 CFR 2520.0-5(a)(6) and 2521.6(h); James M. Mills, 108 IBLA 155, 160 (1989); Mullin v. Keaster, 44 L.D. 161, 168-69 (1915); Frank Strouf, supra at 453.

When they submitted their applications in December 1982 and May 1983, Williams and Roylance stated that the irrigation water would come from Warm Creek. As late as November 1990, when they filed their notices of intention to make final proof they continued to state that the water would come from Warm Creek. 7/ However, they never demonstrated the right to obtain water from that source, and the record suggests that those rights are held by Earl C. Williams. In its November 1990 decisions, BLM directed Williams and Roylance to demonstrate that they held or were in the process of acquiring a right to the necessary water, or risk loss of their entries. They did not respond to BLM's decisions by submitting proof that they held a right to water from Warm Creek, but chose, instead, to indicate that they were taking steps to acquire groundwater rights. On appeal, Williams suggests that her ownership of Warm Creek Ranch should eliminate the requirement to make a formal requisition for the right to use water from Warm Creek Ranch and Roylance refers to her agreement by contract for the right to use the water from Warm Creek Ranch. Both suggest they should be granted extensions of time to drill wells because BLM will not accept these as adequate water rights. Both also say on appeal that they have made the necessary changes regarding irrigation water for the property and "want to finalize

6/ In Swallow, the Assistant Solicitor indicated the importance of ensuring that an entryman is capable of permanently reclaiming entered land before issuing a patent:

"[I]f an entryman were to receive a patent for land * * * which he would not as a reasonable farmer reclaim after patent, in all likelihood such land would not be reclaimed. If this were to occur, the purpose of the desert land law would be flouted by the very act intended to reward compliance with the terms of the statute."

74 I.D. at 6-7.

7/ No mention was made of obtaining water from wells until December 1990, 1 month after the deadline for making final proof. Appellants' long-standing position that they would use water from Warm Creek can possibly be explained in part by the better quality of the Warm Creek water. In an Apr. 26, 1979, letter to BLM, a former owner of the Warm Creek Ranch stated: "Test and experience show the water from the Warm Creek to be very low in salt content unlike our well waters in the area." The creek water is described by BLM as "of exceptionally good quality" (Desert Land Entries at Gandy and Eskdale, Utah, EAR No. UT-050-82--34, at 6). Further, BLM had concluded that the water in the creek, which is owned largely by the Williams family, would be sufficient to irrigate Williams' private ranch land and the entry land. See id. at 3, 4-5, 6.

ownership paperwork." Neither responded to our order of June 26, 1992, offering an opportunity to "file whatever submission they deem appropriate with the Board." 8/

When presenting final proof pursuant to 43 CFR 2521.6(h), a claimant must show that he or she has filed the documents required by the laws of
the applicable State and taken all other necessary steps to secure and perfect the claimed water right. Thus, a tender of final proof is not sufficient if the water right which is to support the entry is sought or held by another party. See United States v. Mills, 91 IBLA 370, 377 (1986). The United States must be assured that the entrant, and the entrant alone, has or is assured of the legal and physical right to sufficient water to fulfill the purpose of the Act of March 3, 1877. 9/ Final proof must establish that the entrant has satisfied the requirements of the Act. See United States v. Shearman, 73 I.D. 386, 428-32 (1966); Stanton v. Durbin, 4 L.D. 445, 446 (1886).

Williams and Roylance have not demonstrated that they had taken the steps necessary to acquire any right to water from Warm Creek. Thus, to the extent that they rely on that water to support their entries, they
have failed to satisfy the final proof requirement. On appeal they indicate that use of the sprinkler system located on adjacent lands (rather than flood irrigation) made more Warm Creek water available to the entered land. This may be true, but the fact remains that they have failed to establish a right to use water from the creek to irrigate and reclaim the entered land. This failure is fatal to their claims.

Roylance states she has an "agreement" affording her the right to use Warm Creek water. No evidence of this agreement has been tendered, and
this unsupported statement is insufficient. The applicable code provision, 43 CFR 2521.6(h), provides that when "the claimant's water right is founded upon contract * * * the final proof must embrace evidence which clearly establishes the fact and legal sufficiency of that right." Compare Ewing T. Skinner, A-30468 (Apr. 5, 1966) at 1, 2, with Joseph W. Huntsman, A-27679 (Sept. 29, 1958), at 2.

In his November 1990 decisions the Area Manager notified both appellants that they must submit proof that they had taken the steps necessary
to acquire a water right, and that this right "entitle[d them] to the use
of a sufficient supply of water to irrigate successfully all the irrigable

8/ Nor did they submit anything with their notices of appeal/statements of reasons.
9/ Neither Williams nor Roylance demonstrated that water from Warm Creek was legally committed to the applied-for land. When no commitment has been made (even though the entryman may be able to do so), there is no proof
that the entryman has the right to a permanent supply of water adequate
to reclaim all of the irrigable portions of the entered land. See M. Kent Hafen, 114 IBLA 239, 243-44 (1990).

land embraced in [their] entr[ies]." 43 CFR 2521.6(h). In response, they submitted evidence that they had (belatedly) filed copies of assignments of Earl C. Williams' applications to drill water wells and appellants' applications to divert the water that would be from those wells to the applied-for land. This abrupt shift in the stated source of water was made after the statutory life of the entries had expired. The party making the entry must establish compliance with the law during the statutory life of the entry. See Wright v. Guiffre, 68 IBLA 279, 286 n.6 (1982), aff'd, No. 83-1148 (D. Idaho June 19, 1984); Wayne E. Bright, supra at 5; Bessie Brown, A-29100 (Dec. 10, 1962), at 3.

If the shifts in the stated water source had been timely, we would hold that appellants failed to satisfy the Act of March 3, 1877, and its implementing regulations. They submitted no evidence that the water from the contemplated wells would be "sufficient * * * to irrigate successfully all the irrigable land embraced in [their] entr[ies]" when they failed to show the "volume of the water supply." 10/ 43 CFR 2521.6(e) and (h). Thus, if they had taken steps to acquire the necessary water rights by filing the necessary drilling permit applications, satisfying 43 CFR 2521.6(h), they failed to demonstrate the existence of sufficient appropriable water. 11/

On appeal, appellants state that they have obtained drilling permits and desire to drill the necessary wells. The fact remains that they have not made the proper final proof showing that the water obtainable from the contemplated wells would be sufficient to successfully irrigate and reclaim the remaining irrigable portions of the entry lands. See Stanley L. Mead, A-30824 (Nov. 13, 1967), at 4-5; Henry R. Lichtwald, A-29063 (Supp.) (Mar. 23, 1964), at 2.

In his January 1991 decisions the Area Manager explained that Williams and Roylance have had since early 1983 to submit the required final proof. The regulation at 43 CFR 2521.6(h) clearly states that a person making a desert land entry must submit proof of having acquired or having taken the necessary steps to acquire a water right, and Williams and Roylance are deemed to have knowledge of this regulatory requirement (see Joe J. Pinson, 84 IBLA 96, 100, 91 I.D. 359, 361 (1984)). There can be no doubt that neither took the necessary first step to obtain the required water rights (filing applications with UDWR) until after BLM's November 1990 decisions holding appellants' applications for rejection.

10/ Appellants state that they were not aware that they had to drill the wells until they received the Area Manager's January 1991 decisions. We cannot say that appellants were on notice that they must drill wells to demonstrate an adequate water supply. The regulations and BLM decisions did not require wells because applicants are afforded the latitude of choosing a water source and the concomitant responsibility for carrying their choice through. Appellants had notice that they must demonstrate an adequate water supply as a part of final proof. See 43 CFR 2521.6(h).

11/ Appellants failed to show that underground water exists in sufficient quantity to successfully irrigate all irrigable portions of that land and produce a remunerative crop. See United States v. Swallow, supra at 8.

It is only now, while the case is on appeal, that appellants say that they "have made the necessary changes regarding irrigation water for the property." However, they do not specify what "changes" have been made
or submit further specifics that might cause us to consider returning the case to BLM so that they may "finalize ownership paperwork." There is absolutely nothing that would lead us to believe that any steps taken by either Williams or Roylance in an attempt to acquire the necessary water rights were undertaken before the statutory life of their entries had expired. Therefore, the evidence alluded to on appeal cannot establish compliance at a time that their entry was viable. See United States v. Mauldin, A-30446 (Jan. 6, 1966), at 4; Philip Hubert Pitman, A-30318 (June 10, 1965), at 3.

In his January 1991 decisions the Area Manager properly concluded that Williams and Roylance had not tendered proof that they had or were assured of the legal and physical right to sufficient water to reclaim the entered land, thus fulfilling the purpose of the Act of March 3, 1877, as directed to do in the Area Manager's November 1990 decisions, and that as a result of their failure, they were not entitled to a patent. It was therefore proper for him to reject their tender of proof and cancel their entries. 12/ See Harry Gray Browne, supra at 223.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

R. W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

12/ It is important to note that we are not concerned with the extent
to which BLM has already accepted William's final proof of her entry for land in lots 6 and 7 of sec. 4 or Roylance's final proof of entry for land in the NE¼ SE¼ sec. 3 and the NE¼ SW¼ sec. 4. They have paid the required fees, and, if that land has not proceeded to patent, it may now do so.
See 43 U.S.C. § 321 (1988); Harry Gray Browne, supra at 222.